

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/695,661	Applicant(s) CZYGAN, GERALD
Examiner JESSICA REIDEL	Art Unit 3766

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 02 April 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See *Continuation Sheet*. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____
Claim(s) objected to: 9-17,32,34,35,38,39,42,45,49,54,59 and 64.
Claim(s) rejected: 1-3,5,8,28,30,40,43,46,47,50-52,55-57 and 60-62.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☒ Other: Note the attached Examiner Initiated Interview Summary and PTO-892.

/Jessica L. Reidel/
Patent Examiner, Art Unit 3766
April 16, 2008

/Carl H. Layno/
SPE, Art Unit 3766

Continuation of 11, does NOT place the application in condition for allowance because: Applicant's arguments traversing the rejections applied against Claims 1, 3, 4, 8, 40, 43, 46, 47 and 50-52 under 35 U.S.C. 103(a) as being unpatentable over Prutchi in view of Meier (see the Final Rejection of February 6, 2008) have been sufficiently considered, but they are not found to be persuasive and they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal. At page 14 of the Remarks, Applicant argues various elements of which the claimed invention allegedly "does not rely", however, such limitations are not recited in the claims nor are such elements required by the claim language invoking 35 U.S.C. 112, 6th paragraph.

In response to Applicant's arguments that Meier relies on using active measurement pulses and "the claimed invention of claim 1" does not rely on such active pulses to act as a voltage/current source in order to facilitate the measurement of myocardial impedance, the Examiner respectfully disagrees. During examination, claims must be given their broadest reasonable interpretation consistent with the specification. The device taught by Prutchi in view of Meier discloses Applicant's invention as claimed and the fact that Meier relies on using active measurement pulses for measuring stimulation outcome is irrelevant. Claims are interpreted in light of the specification and although Applicant's specification describes an embodiment of a device which comprises a "means for monitoring" without reliance of any active voltage or current pulses, such negative limitations are not claimed explicitly nor were the words that are used in the claims defined in the specification to require these negative limitations. The device taught by the modified Prutchi reference, as discussed in the Final Rejection of February 6, 2008, includes an equivalent "means for monitoring stimulation outcome" that performs the functions specified in Claim 1, is not excluded by any explicit definition provided in the specification for an equivalent, and is an equivalent of the means plus-function limitation. Where Applicant's disclosure is silent as to what constitutes equivalents and the Examiner has made out a prima facie case of equivalence, the burden is placed upon the Applicant to show that a prior art element, which performs the claimed function, is not an equivalent of the structure, material, or acts disclosed in the specification. See *In re Mulder*, 716 F.2d 1542, 1549, 219 USPQ 189, 196 (Fed. Cir. 1983). Applicant's response of April 2, 2008 does not meet the burden of proof required in this case and the arguments submitted do not provide sufficient evidence and/or convincing reasoning proving that the "means for monitoring stimulation outcome" taught by the modified Prutchi reference should not be considered an equivalent to the specific structure, material or acts disclosed in the specification.